Nos. 17-1859 & 17-1905

In the United States Court of Appeals for the Fourth Circuit

JTH TAX, INC., D/B/A LIBERTY TAX SERVICE; AND SIEMPRETAX, LLC,
PLAINTIFFS-APPELLANTS

v.

GREGORY AIME; WOLF VENTURES, INC., D/B/A WOLF ENTERPRISES; AIME CONSULTING, LLC; AND AIME CONSULTING, INC.,
DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (CIV. NO. 16-279) (THE HONORABLE HENRY COKE MORGAN, JR.)

REPLY BRIEF AND CROSS-APPEAL RESPONSE OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Aime's appeal brief confirms the fatal flaws in his case: his claim for breach of contract rests on an oral extension offer by Liberty that Aime never accepted or reduced to writing and for which he offered no consideration in exchange. Under settled Virginia law, the parties never entered a valid agreement to extend the time for Aime to exercise his repurchase option. The district court's decision to the contrary, which left unanswered numerous dispositive issues, should be reversed.

In an attempt to prove the supposed oral modification and thus stave off reversal, Aime offers this Court a grab bag of arguments—none of which is supported by actual law or the record and many of which are simply irrelevant. He improperly labels the district court's legal conclusions about contract acceptance as "findings of fact" in the hope of avoiding de novo review. He concedes, as the facts demand, that there was no bargained-for consideration, but he argues that consideration was not required or that his detrimental reliance is a valid substitute, both positions that the Virginia Supreme Court has roundly rejected. With respect to the statute of frauds, he claims that the PSA could be performed within a year because the parties might have *terminated* it, a circular argument that courts likewise have rejected. And he completely ignores some of Liberty's arguments altogether. His failure to engage meaningfully with Liberty's arguments—like that of the district court—is revealing.

In the final four pages of his brief, Aime cross-appeals the district court's dismissal of his fraud claim and discretionary denial of attorneys' fees. His cursory discussion of those rulings identifies no ground for reversal. As the district court correctly held, his "fraud" claim is nothing more than a claim for breach of contract; and, even if he had proved fraud, the district court appropriately concluded that it had no authority to award him fees and that it would not exercise its discretion to do so even if it had such authority.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE PARTIES VALIDLY MODIFIED THE CONTRACT TO EXTEND THE TIME TO EXERCISE THE PSA'S REPURCHASE OPTION

The central question on appeal is whether the parties validly modified the repurchase option in the written PSA to extend the deadline for Aime to obtain an EFIN.[1] Under binding Virginia law—which Aime completely ig-

[1] Aime's assertion that Liberty "does not appeal any of the damages awarded" is seriously misleading. Aime Br. 4. Liberty challenges on appeal the district court's conclusion that the parties formed a contract to extend the repurchase option; the court's award of damages is necessarily contingent on that conclusion. *See* J.A. 873-875.

nores in his brief—modifications to a contract must be proved by "'clear, unequivocal and convincing evidence.'" Liberty Br. 19-20 (quoting *Lake Ridge Apartments, LLC* v. *BIR Lakeridge, LLC*, 335 Fed. App. 278, 283 (4th Cir. 2009) (per curiam)). Aime failed to satisfy this heightened burden of proof for three independent reasons: (1) he did not accept Liberty's offer; (2) there was no consideration for any modification; and (3) the alleged modification was not in writing, as required by the statute of frauds. Aime's arguments to the contrary repeatedly ignore or even misstate Virginia law.

A. Aime Did Not Accept Hewitt's Offer

1. Aime did not carry his burden to prove by clear, unequivocal, and convincing evidence that he accepted Hewitt's extension. As a preliminary matter, Aime misstates the standard of review on this issue. He claims that the district court's conclusion that Aime accepted Hewitt's offer is a finding of fact reviewed for clear error. *See* Aime Br. 24 ("With no basis upon which to conclude that the finding of valid acceptance was clearly erroneous, this Court should not set aside that finding."); *see also id.* at 21-22. The parties, however, do not dispute the underlying facts; the question presented on appeal is

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Aime also asserts that Liberty is not challenging the district court's conclusion that it breached the implied covenant of good faith and fair dealing. Aime Br. 15. That is likewise incorrect. The district court did not distinguish between Aime's claims for breach of contract and breach of the implied covenant. *See* J.A. 873. Liberty's appeal implicates the claim for breach of the implied covenant insofar as it rests on the purported extension of the repurchase option.

whether those facts establish acceptance under Virginia law. That question is a mixed question of law and fact that this Court reviews de novo. *See QinetiQ US Holdings, Inc.* v. *Comm'r*, 845 F.3d 555, 562 (4th Cir.), *cert. denied*, 2017 WL 4339935 (U.S. 2017); *see also Phillips* v. *Mazyck*, 643 S.E.2d 172, 175 (Va. 2007) ("The material facts concerning the formation of the parties' proposed arbitration agreement are not in dispute. Thus, the issue of contract *vel non* is a question of law." (internal quotation marks omitted)); *PCS Nitrogen Inc.* v. *Ashley II of Charleston LLC*, 714 F.3d 161, 173 (4th Cir. 2013) ("[W]e review the district court's applications of contract principles de novo.").

Worse still, Aime inverts the burden of proof by contending that Liberty's argument "overlooks the fact that the company offered no contrary evidence at trial." Aime Br. 24. In Virginia, as everywhere, "the party asserting the existence of an agreement bears the burden of persuasion to prove its existence." *Baldwin* v. *Baldwin*, 603 S.E.2d 172, 174 n.1 (Va. Ct. App. 2004). And, here, as already discussed, Aime bears a heightened burden to prove the validity of the alleged modification. *See* pp. 2-3, *supra*. He has failed to do so.

2. Tellingly, Aime barely defends the district court's reasoning on acceptance. *See* Aime Br. 20-24. The district court largely relied on Aime's April 20 and April 28 emails as evidence of acceptance. *See* J.A. 871. Neither objectively communicated unequivocal and unqualified assent to the terms of Hewitt's offer. *See* Liberty Br. 21-26. To the contrary, the emails, which are

the only communications from Aime to Liberty in evidence, demonstrate that "[r]unning through the entire record is a thread of uncertainty as to the true status of the parties." *Bloomberg-Michael Furniture Co.* v. *Coppes Bros. & Zook*, 126 S.E. 59, 63 (Va. 1925).

Backing away from the district court's reasoning, Aime argues for the first time in this litigation that he accepted Hewitt's offer in his conversation with Marie Fletcher on April 9. Aime Br. 21. The trouble, of course, with inventing narratives on appeal is that the record does not have a chance to catch up. Both Fletcher and Aime testified about the April 9 conversation, but each focused exclusively on what Fletcher conveyed to Aime about Hewitt's offer. Neither testified that Aime said anything in response. *See* J.A. 437-439, 503-504. The only evidence Aime cites to try to fill this gap in the record is his testimony about his own state of mind upon learning of the offer. *See* Aime Br. 21; J.A. 504 ("Q: And did you believe the message that she told you? A. Yes, of course. I was ecstatic. I was happy. I thought it was about to come back together."). Aime's private, unexpressed reaction to Hewitt's offer is not evidence of acceptance. *See Phillips*, 643 S.E.2d at 175 ("We ascertain whether a party assented to the terms of a contract from that party's words or acts, not from his or her unexpressed state of mind."); *Lucy* v. *Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) (determining acceptance "exclusively from those expressions of [the parties'] intentions which are communicated between them" (internal quotation marks omitted)). Aime identifies no testimony that he communicated acceptance to the offer during his April 9 conversation with Fletcher.[2]

Nor did Aime unambiguously accept the offer in his inscrutable April 20 email. According to Aime, he accepted Hewitt's offer by saying, "[I] understand that you are graciously allowing me to extend the my [sic] PSA agreement until December," and then following up with a request "to set a face to face meeting," which he contends was just a request to get the extension in writing. Aime Br. 22. But nothing in the email unequivocally communicates his acceptance of an offer. To the contrary, the most natural reading of the email is that Aime acknowledged the offer and then requested to meet Hewitt in person for further discussion of the terms of a potential agreement. *See* J.A. 816. (Of course, from the recipient's point of view, if Aime wanted the agreement in writing, he could have simply requested as much in his email rather than requesting a meeting.)

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[2] Nor can Aime fill this gap with an adverse inference drawn from Liberty's decision not to present the testimony of Hewitt at trial. *See* Aime Br. 23; J.A. 871. Hewitt was not a party to the conversation between Fletcher and Aime in which Aime claims he accepted an offer. And, to the extent Aime contends that he accepted the offer in his April 20 or 28 emails, those emails are a matter of record and Hewitt's testimony is unnecessary to interpret the plain text of those emails.

Even assuming Aime's interpretation of the email is a permissible one, he has no answer to the fact that Liberty's interpretation also is permissible. And if the email can be read both as an acceptance/request for a written contract as well as an acknowledgment/request for further discussion, then the email is ambiguous. When a "reasonable person could view" Aime's communication "as assent, rejection, or an invitation to bargain further . . . it is the offeror's reaction to that ambiguous acceptance that controls whether the parties have entered into a contract." *Trademark Props. Inc.* v. *A&E Television Networks*, 422 Fed. App. 199, 204 (4th Cir. 2011) (alteration in original) (internal quotation marks omitted).

The only other communication in the record—his April 28 email—affirmatively demonstrates a lack of acceptance. In the email, Aime expressed concern that Hewitt was moving on without him, and then asked, "Would you like to switch leases over and handle a buyout or *will you extend my Psa agreement* and work things out with the buyback[?]" J.A. 736 (emphasis added). Aime argues, based solely on his self-serving testimony, that he thought that "a deal was being unwound." Aime Br. 23-24. If that were true, and Aime already had accepted Hewitt's offer, one would expect Aime to respond to Hewitt's "reneging on the deal" with indignation. *Id.* at 24. At the very least, he would have reminded Hewitt about their deal. But instead, Aime politely asked if Hewitt would like to move on or extend the PSA. That is simply not how a sophisticated businessman who has already accepted an offer would speak to his promisor. *See* J.A. 171.

It is this Court's task to determine, on de novo review, whether the record proves that Aime unambiguously accepted Hewitt's offer to modify the parties' contract by "clear, unequivocal and convincing evidence." *Lake Ridge Apartments*, 335 Fed. App. at 283. Aime's testimony about his own state of mind about the offer and his ambiguous April 20 email to Hewitt come nowhere close to satisfying that standard. The Court should reverse the decision below on that basis alone.

B. Aime Concedes That The Alleged Extension Agreement Lacked Bargained-For Consideration

The alleged extension agreement also fails because it lacked consideration. As Aime apparently acknowledges, consideration is "the price bargained for and paid for a promise." *Smith* v. *Mountjoy*, 694 S.E.2d 598, 602 (Va. 2010) (internal quotation marks omitted); *see* Aime Br. 24. Liberty argued in its opening brief that Aime "did not *bargain* to pay any price, *whether benefit or detriment*, for Hewitt's promise to extend the PSA repurchase deadline." Liberty Br. 28 (emphases added). Aime appears to concede that he did not bargain to provide consideration. *See* Aime Br. 27. Aime did not offer and Hewitt did not request anything in exchange for the extension, either at the time of the offer or at any other time. As a result, there was no consideration to support the extension.

Aime advances two legal arguments in an attempt to overcome the absence of evidence of bargained-for consideration: first, that consideration was not required to extend the option deadline; and, second, that his detrimental reliance on Hewitt's offer passed as valid consideration for the extension. Settled Virginia law forecloses both arguments.

1. New Consideration Is Required To Extend An Option Deadline

Aime argues that "new consideration is not required for a time extension that does not change the substantive terms of the contract." Aime Br. 25. As support, Aime cites only an unpublished decision by an intermediate appellate court in Colorado, *Rocky Mtn. Plastics Corp.* v. *Seder Plastics Corp.*, 488 P.2d 99 (Colo. App. 1971). Aime's claim, however, is governed by Virginia law, not Colorado law. As Liberty explained in its opening brief, the rule in Virginia is that "the time for the performance of a written agreement may be extended by parol, and an extension of such written agreement may be shown *when supported by some new and sufficient consideration.*" *Cummins* v. *Beavers*, 48 S.E. 891, 893 (Va. 1904) (emphasis added); Liberty Br. 30, 32.

Cummins, which Aime completely ignores in his brief, directly refutes Aime's assertion that the alleged extension is valid without new consideration. The issue in *Cummins*, as in this case, was whether there existed a contract to extend a purchase option. The prospective buyer told the seller that he "had not had time" to exercise the option and said "he would like to have two weeks" to make a decision. 48 S.E. at 894. The seller simply agreed, without asking for anything in return, and said he would "come back this day two weeks." *Id.* The Virginia Supreme Court held that the extension was "without a consideration, and, clearly [the seller] had the right to withdraw [the offer] at any time" before the buyer exercised the option. *Id.* Although the court sided with the buyer when the seller failed timely to revoke his offer, the rule regarding consideration for time extensions was clear: when "no consideration for the verbal promise or agreement to extend the time for the exercise of the option" is given, "such promise [is] . . . not enforceable." *Id.*

Like the prospective buyer, Aime was unable to exercise his option before the agreed-upon deadline. Like the seller, Hewitt offered an extension without asking for anything in return. The extension was "without a consideration," and Hewitt therefore "had the right to withdraw [the offer] at any time" before Aime exercised the option. *Id.* That is precisely what happened, as Liberty has previously explained. *See* Liberty Br. 30.

Incredibly, Aime contends that "Liberty Tax cites no case law" contrary to the Colorado Court of Appeals' (unpublished) rule, and that this failure "should end the inquiry." Aime Br. 25. That contention completely ignores *Cummins*, which Liberty cited in its opening brief. *See* Liberty Br. 30, 32. *Cummins* flatly contradicts Aime's misstatement of Virginia law. Because Liberty did not request—and Aime did not offer—anything in return for the alleged extension, Liberty was not bound to keep the offer open beyond May 8. *See Livermon* v. *Lloyd*, 157 S.E. 146, 149 (Va. 1931) ("[S]uch an agreement for extension must be a binding contract, supported by consideration, with all the elements of a contract.").

2. *Detrimental Reliance Is Not Consideration Unless It Is Bargained For*

a. Alternatively, Aime contends that the extension is supported by consideration because "[a]fter [he] accepted the extension, he reasonably relied on it to his legal detriment." Aime Br. 25. This argument, which sounds in promissory estoppel, has likewise been rejected by Virginia courts. Virginia courts have persistently refused to permit parties to substitute their detrimental reliance for the basic elements of contract. *See Nat'l Bank of Fredericksburg* v. *Va. Farm Bureau Fire & Cas. Ins. Co.*, 606 S.E.2d 832, 834 n.* (Va. 2005) (a claim "founded upon [the party's] reliance, to its detriment, upon [a] misleading promise of future conduct" is not cognizable in Virginia).

Historically, there had been some confusion about whether Virginia law recognized promissory estoppel,[3] but the Virginia Supreme Court unambiguously rejected the doctrine in 1997. *See W.J. Schafer Assocs., Inc.* v. *Cordant, Inc.*, 493 S.E.2d 512, 516 (Va. 1997). In that case, the court rejected Section

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[3] 3 Eric Mills Holmes, *Corbin on Contracts* § 8.12, at 201 (rev. ed. 1996) ("Virginia courts doggedly refuse to admit, candidly and definitely, that they in fact apply the doctrine of 'promissory' estoppel.").

90(1) of the Restatement (Second) of Contracts, which states that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promissee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." The court declared emphatically "that promissory estoppel is not a cognizable cause of action in the Commonwealth." *W.J. Schafer Assocs.*, 493 S.E.2d at 516.

Under Virginia law, then, detrimental reliance cannot substitute for consideration, even when a party stands to lose significant financial resources it would not otherwise have spent. *See Fed. Ins. Co.* v. *Parnell*, No. 09-cv-33, 2009 WL 2160452, at *4 (W.D. Va. July 20, 2009). For example, the counterclaim plaintiff in *Parnell* alleged that his insurer had breached a contract to pay his legal fees. *Id.* at *1. Like Aime, he claimed to have spent significant amounts in reliance on a promise by the insurer. *Id.* at *4 n.3. Despite acknowledging that his complaint was "replete with allegations that might support a plausible claim of promissory estoppel," the court held that "Virginia law does not recognize such a cause of action" and thus rejected his breach-of-contract claim. *Id.* at *4; *see also Browning* v. *Fed. Nat'l Mortg. Ass'n*, No. 12-cv-9, 2012 WL 1144613, at *3 (W.D. Va. Apr. 5, 2012) ("When a cause of action is based upon a party's reliance, to its detriment, upon a misleading promise, it . . . cannot be sustained under Virginia law.").

In fact, Virginia law does not permit the application of promissory estoppel to overcome a failure of consideration no matter how severe the plaintiff's detriment. In *Martin* v. *NAES Corp.*, No. 12-cv-58, 2013 WL 5945655 (W.D. Va. Nov. 6, 2013), *aff'd per curiam*, 583 Fed. App. 162 (4th Cir. 2014), the court held that "Plaintiff's detrimental reliance argument does nothing to change the facts surrounding Plaintiff's misconceptions about the supposed oral agreement." *Id.* at *4. The court held to this firm rule even after expressing "sympathy" for the plaintiff, who testified that "he detrimentally relied on the supposed oral agreement, serving Defendant in harsh winter conditions until his hands cracked and bled and . . . stay[ing] in a lonely hotel, away from his family and friends at Christmas time." *Id.* (internal quotation marks omitted). Despite its sympathy, the court acknowledged that "Defendant is unequivocally correct that . . . Virginia has rejected the use of an offensive promissory estoppel argument." *Id.* Another court refused to remedy an agreement's lack of consideration even though the plaintiff detrimentally relied on a promise by undergoing "excruciating work-hardening rehabilitation in order to return to work." *Hammonds* v. *Builders First Source-Atl. Grp., Inc.*, No. 01-cv-23, 2002 WL 535071, at *3 (W.D. Va. Mar. 28, 2002) (internal quotation marks omitted).

As in *Parnell*, *Browning*, *Martin*, and *Hammonds*, the "gravamen" of Aime's breach-of-contract claim is "grounded in detrimental reliance" and thus "cannot be sustained under Virginia law." *Browning*, 2012 WL 1144613, at *3. Aime does not identify a single promise or detriment *offered in exchange for* Hewitt's extension. Even assuming that Aime's actions are evidence of detrimental reliance, they are not, as Aime claims, "evidence of consideration." Aime Br. 25.

b. Even if Virginia law permitted detrimental reliance as a substitute for bargained-for consideration, Aime's efforts to obtain a new EFIN and his payment of rent and utilities would not qualify as valid consideration. *See* Liberty Br. 31-35.[4]

i. In its opening brief, Liberty identified four reasons why Aime's efforts to obtain a new EFIN are not valid consideration for the extension. Aime responded to none of them, stating only that he reapplied for the EFIN "in reliance on Liberty Tax's promise." Aime Br. 26. That is not enough. First, as Liberty explained, because Aime had no legal obligation to reapply for his EFINs, his unilateral decision to do so cannot constitute consideration. *See* Liberty Br. 31 (quoting *Busman* v. *Beeren & Barry Invs., LLC*, 69 Va. Cir. 375, 378 (2005) ("[I]f it appears that one party was never bound on its part to do the acts which form the consideration for the promise of the other, . . . the

[4] Throughout pretrial proceedings, Aime argued that his assistance "through the height of the 2016 tax season" could be consideration for the extension. *See* Dkt. 108 at 21. In its opening brief, Liberty explained why that is wrong, and Aime declined to defend the argument in his response.

other party is not bound." (internal quotation marks omitted))). Second, if Aime were correct that unbargained-for efforts expended in the course of exercising an option could constitute consideration, most revocable options would automatically be transformed into irrevocable option contracts, given that nearly every option requires the expenditure of at least some nominal effort. *See id.* at 32. Third, because "the PSA already contemplated that Aime . . . would make efforts to secure an EFIN," his undertaking those efforts is not new consideration, as would be required to support an extension agreement. *See id.* at 32-33 (quoting *Cummins*, 48 S.E. at 893 ("[A]n extension of . . . [the time to perform a] written agreement may be shown when supported by some new and sufficient consideration.")). And, finally, Aime's efforts to obtain an EFIN cannot constitute bargained-for consideration in light of the fact that Hewitt was told before the supposed extension offer that Aime had already completed his work to restore the EFINs. *See id.* at 33; J.A. 436. Aime has no response to any of those points.

ii. Aime also misses the mark regarding Liberty's argument that his payment of rent and utilities is not valid consideration for Hewitt's extension. Aime suggests that his payment of rent and utilities was a detriment because "Liberty Tax was the one legally responsible for such expenses, not Mr. Aime." Aime Br. 27. But that is precisely Liberty's point: Aime already enjoyed a contractual right to be reimbursed for his payments to his third-party lessors and utility providers because Liberty assumed responsibility for those payments. Liberty's failure to reimburse Aime (which was not even evident until May) was thus not a matter of consideration but of breach of contract—hence, Aime's countersuit for damages from Liberty's alleged failure to reimburse. Moreover, although Liberty was liable for the payments, Aime was the one in privity with his lessors. Because Liberty owned the financial obligation and Aime was contractually obligated to service his independent contracts prior to the extension, Aime's post-PSA conduct neither benefited Liberty nor caused him any new detriment.

Nor is it true, as Aime contends, that he "could have terminated" his leases and utility contracts "at any time after April 9, 2016." Aime Br. 27. Even assuming that immediate cancellation of his leases and other agreements was permitted under the terms of those contracts, which Aime did not introduce into evidence at trial, such action would have breached several provisions of the PSA. First, the PSA obligated Aime to "notify the appropriate telephone company and all listing agencies . . . of the change in ownership" and "to sign and tender all documents necessary to effect a transfer of control of all telephone numbers (including fax numbers), telephone listings, and telephone display ads used in connection with the Business." J.A. 704-705. Second, as part of Aime's post-termination obligations, the PSA granted Liberty the right to request that Aime "[a]ssign to Liberty . . . any interest . . . in any lease, sublease, *or any other agreement* related to the Franchised Business." J.A. 724 (emphasis added). Aime also agreed that he would "take no actions . . . that could hinder or compromise the success of JTH Tax Inc." J.A. 705. The PSA thus did not allow Aime to terminate his leases and other agreements without Liberty's consent. By continuing to service contracts under which he was already obligated and for which Liberty was liable, Aime did not undertake a new detriment or provide Liberty a new benefit.[5]

3. Aime's Repurchase Option Was Contingent On Liberty's Approval And Was Thus Illusory

a. Finally, the PSA itself (and thus any extension of the PSA) was illusory because Aime's repurchase option was subject to an illusory condition precedent—*i.e.*, Liberty's approval. *See* Liberty Br. 35-37. Aime attempts to deflect consideration of this argument on the merits, contending that Liberty did not preserve it. That is incorrect. Liberty argued repeatedly before the district court that the PSA did not obligate Liberty to approve the resale of Aime's franchises. *See* Dkt. 51-1 at 4; Dkt. 57 at 10; J.A. 159; J.A. 673. The district court acknowledged and rejected Liberty's argument that "it had no obligation to sell back all of the franchises that comprise the Business." J.A. 869. This issue is thus properly before this Court. *See Volvo Constr. Equip. N. Am., Inc.* v. *CLM Equip. Co.*, 386 F.3d 581, 603-604 (4th Cir. 2004) (considering an argument "decided by the district court").

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[5] Aime also takes issue with Liberty's assertion that his payments made during the original PSA period "bear no relation to acceptance of an extension of that deadline past May 8." Aime Br. 26. This argument, located in the section of Liberty's brief addressing acceptance, is not relevant to consideration. Even so, the statement is true: Aime's payments from April 9 to May 8 do not indicate acceptance of an extension; they indicate performance on his original agreement.

In any event, this argument is merely one variant of the broader claim that the alleged extension lacked consideration, and Liberty raised the issue of consideration at every phase of the litigation, from dismissal and summary judgment motions to closing arguments. Thus, even if Liberty did not specifically label its argument below as one about an "illusory" condition, it is at most "a new argument to support what has been [its] consistent claim," and is therefore preserved. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also United States* v. *Robinson*, 744 F.3d 293, 300 n.6 (4th Cir. 2014) ("Although he did not make this precise argument before the district court, Robinson did challenge his criminal history score, and thus preserved his claim.").

b. Aime's response on the merits misapprehends Liberty's illusory consideration argument. He first attacks Liberty for suggesting that the extension, but not the original option, is illusory, but Liberty's argument is that both were illusory. *See* Liberty Br. 35 ("Another, independent reason Aime cannot enforce the option extension is that *the option* and the extension were illusory." (emphasis added)). Aime next asserts that "[t]he only way for Liberty to maintain that it had no obligation to approve Aime's new franchise application . . . is to admit that it never intended to sell back the franchises in the first place." Aime Br. 29. That is neither correct nor relevant. Liberty's argument is not about intent; it is about the actual contractual language. Aime's ability to repurchase his franchises depended on the discretion of Liberty's CEO. Because the PSA does not obligate Liberty to sell the franchises back, the promise is illusory. *See Miller* v. *SEVAMP, Inc.*, 362 S.E.2d 915, 917 (Va. 1987) ("Both parties must be bound or neither is bound." (internal quotation marks omitted)).

Aime selectively emphasizes language providing that he "shall" have the option to repurchase, Aime Br. 28, but "[t]his court is duty bound to construe a contract as a whole, considering every word and every paragraph," *Dowling* v. *Rowan*, 621 S.E.2d 397, 400 (Va. 2005). Under the contract as a whole, Aime's ability to repurchase the franchises was "subject to Liberty's standard sales and approval process"—*i.e.*, a condition precedent. J.A. 705. A promise is illusory if it is subject to a condition precedent that "is within the control of one of the parties." *iCore Networks, Inc.* v. *All., Inc.*, No. 12-cv-535, 2012 WL 3071141, at *4 (E.D. Va. July 26, 2012). Because Liberty's promise to sell the franchises back to Aime was subject to a condition precedent within its control, the promise was illusory. The limited trial testimony permitted by the district court on this issue confirmed the point: Liberty's sales and approval process grants the CEO final say over whether to approve franchise applicants, and Aime would have been "treated as a new prospect" if he had attempted to exercise his option. J.A. 193, 221; Liberty Br. 35-37; *see also* pp. 29-32, *infra* (discussing the court's exclusion of additional evidence on this point). Read as a whole, then, it is clear that Aime's ability to repurchase the franchises was contingent "upon [Liberty's] approval of the transaction[]." *See Wexford Bancorp, L.L.C.* v. *Concept 1, L.L.C.*, 66 Va. Cir. 72, 72-73 (2004) (internal quotation marks omitted). As a result, Liberty's promise to sell back Aime's franchises was of an "illusory or optional nature." *Id.* at 73.

C. The Alleged Extension Is Unenforceable Because It Was Not In Writing

Aime does not dispute that contract modifications must be in writing if the original agreement was required to be in writing. *See Lindsay* v. *McEnearney Assocs.*, 531 S.E.2d 573, 575-576 (Va. 2000); *see also Connelly* v. *Blot*, No. 16-cv-1282, 2017 WL 3438374, at *4 (E.D. Va. Aug. 9, 2017) (whether the modification must be in writing "is determined by whether the parties' original obligation was required to be in writing"), *appeal docketed*, No. 17-1997 (4th Cir. Aug. 28, 2017). Because the extension modifies the PSA, that extension must be in writing if the PSA was required to be in writing. The PSA, which contains several two-year covenants and terminates the original five-year franchise agreements, was required to be in writing, and Aime's arguments to the contrary are flawed and unpersuasive. Nor can the doctrine of equitable estoppel save Aime from his unreasonable reliance on an offer he no longer believed was available to him.

1. The PSA Is Within The Statute Of Frauds

a. Both parties agree that as consideration for Liberty's purchase of the franchises, Aime covenanted not to compete or solicit customers for two years, starting the day of closing. *See* Liberty Br. 5, 7; Aime Br. 30. Aime wisely does not dispute that a contract that contains restrictive covenants lasting more than a year is subject to the statute of frauds as a general matter. *See* Liberty Br. 39. Even so, Aime contends that, because the PSA contemplates the possibility that the repurchase option could be exercised pursuant to a *separate* contract within a year, the statute of frauds does not apply. This argument suffers from several flaws.

Aime's theory requires the Court to look outside the governing contract to a hypothetical, undrafted contract, to test whether performance within a year is possible. But Virginia's statute of frauds applies when "the oral contract *that forms the basis of [the] claim* could not be performed within one year." *Meriweather Mowing Serv., Inc.* v. *St. Anne's-Belfield, Inc.*, 51 Va. Cir. 517, 519 (2000) (emphasis added); *see also* Va. Code § 11-2(8) ("[N]o action shall be brought . . . [u]pon any agreement that is not to be performed within a year."). Aime's countersuit is based on an alleged oral modification of the PSA. The question presented is whether Aime can perform the terms *of the PSA* within a year, not whether the PSA may be extinguished by operation of a separate, subsequent, and speculative contract of unknown terms. Because a two-year covenant cannot be performed within a year, "subsequent oral agreements" modifying the PSA must be in writing. *McKown* v. *N. Am. Dev.*, No. LS-2336-2, 1991 WL 834897, at *1, *4 (Va. Cir. Ct. Apr. 2, 1991) (seven-year noncompete clause); *see also Paragon Servs., Inc.* v. *Hicks*, 843 F. Supp. 1077, 1078 (E.D. Va. 1994) ("The state court dismissed the non-compete count pursuant to the Statute of Frauds . . . ."); *SD Prot., Inc.* v. *Del Rio*, 498 F. Supp. 2d 576, 584 (E.D.N.Y. 2007) (contract for one year of employment was subject to the statute of frauds because of a five-year noncompete covenant).

Aime also errs by equating the "*termination* of a contract . . . [with] its *completion* by performance." *Falls* v. *Va. State Bar*, 397 S.E.2d 671, 672-673 (Va. 1990) (emphases in original). The statute of frauds applies to "any agreement that is not to be *performed* within a year." Va. Code § 11-2(8) (emphasis added). Under Virginia law, even if it is possible that a contract "could have been terminated by either party within one year of its beginning, this is not the same thing as performance." *Mizell* v. *Sara Lee Corp.*, No. 05-cv-129, 2005 WL 1668056, at *5 (E.D. Va. June 9, 2005), *aff'd per curiam*, 158 Fed. App. 424

(4th Cir. 2005). "Termination and performance are different." *JD Architectural Studio, Inc.* v. *Maddox*, 66 Va. Cir. 10, 12 (2004).

According to the PSA, Aime had "the option to buy back the Business . . . *pursuant to a separate purchase and sale agreement between the parties* and subject to [Liberty's] standard sales and approval process." J.A. 704 (emphasis added). Aime assumes, without any basis in the language of the PSA, that the two-year covenants "would be replaced or cease to exist." Aime Br. 32. But even speculating that the separate agreement would terminate Aime's various two-year covenants under the PSA, "the result would not be an alternative form of performance but excusable nonperformance." 72 Am. Jur. 2d *Statute of Frauds* § 41 (West 2017); *see also Ferrera* v. *Carpionato Corp.*, 895 F.2d 818, 821 (1st Cir. 1990) (holding that a two-year employment contract with a 90-day termination provision must be in writing because "the recision [sic] of a contract is not the performance of it" (internal quotation marks omitted)). At most, exercising the repurchase option through a separate contract would *excuse*, but not fulfill, Aime's performance under the PSA. Termination constitutes full performance for purposes of the statute of frauds only if the contract "expressly provide[s] that [termination] would constitute full performance." *Falls*, 397 S.E.2d at 673; *see also JD Architectural Studio*, 66 Va. Cir. at 12 ("Absent such express agreement, the contract would end not by performance, but by termination."). The PSA not only fails to provide that its termination would constitute full performance, it says nothing at all about what, if any, effect the repurchase option would have on Aime's two-year covenants. J.A. 704-705; *see Falls*, 397 S.E.2d at 673 ("Because Falls' contract contains no such provision providing for full performance in the event of [termination], the statute of frauds is applicable.").

b. The PSA was further required to be in writing because it terminated the five-year franchise agreements. *See* Liberty Br. 39. Aime concedes that the PSA terminated the five-year franchise agreements and does not contest that those franchise agreements were required to be in writing. He contends, however, that (a) Liberty failed to preserve this argument; and (b) the PSA did not modify the franchise agreements.

As to preservation: Again, Aime's view of the preservation requirement is unduly restrictive. "Once a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). Liberty raised the statute of frauds defense generally, and cited *Lindsay* specifically, in the district court. *See* Dkt. 118 at 13 ("Where a contract is required to be in writing pursuant to the Statute of Frauds, any modification to that contract must also be in writing . . . ." (citing *Lindsay*, 531 S.E.2d at

575-576)). The district court also was aware that the PSA terminated the franchise agreements. *See* J.A. 862. Liberty's argument that the termination of the franchise agreements supports its statute of frauds defense is "a new argument to support what has been [its] consistent claim." *Lebron*, 513 U.S. at 379; *see also Robinson*, 744 F.3d at 300 n.6; *see* p. 18, *supra*.

As to the merits: Virginia law does not differentiate between termination or modification of a contract for purposes of the statute of frauds; in either case, the subsequent agreement must be in writing. *See Reid* v. *Boyle*, 527 S.E.2d 137, 144-145 (Va. 2000) ("A contract in writing, . . . required to be so by the statute of frauds, may [not] be *dissolved or varied* by a new oral contract . . . ." (emphasis added) (internal quotation marks omitted)).

The *Lindsay* rule is concerned with preventing parties from "circumvent[ing] the statute of frauds," which could occur regardless of whether the written contract is changed through termination or modification. *Lindsay*, 531 S.E.2d at 576. As the Virginia Supreme Court explained, the statute of frauds exists "to provide reliable evidence of the existence and terms of certain types of contracts," and permitting parties to change those contracts through subsequent oral agreements "would permit the very mischiefs which the statute meant to prevent." *Id.* (internal quotation marks omitted). Here, the parties' original obligations, *i.e.*, the franchise agreements, were required to be in writing. Because the PSA terminated the franchise agreements, it had to be in writing as well. *See Connelly*, 2017 WL 3438374, at *4. The alleged oral modification to the PSA thus violated the statute of frauds.

2. *Aime Did Not Establish The Elements Of Equitable Estoppel*

a. As Liberty argued, the district court's unexplained, alternative conclusion that Liberty was equitably estopped from invoking the statute of frauds was incorrect. Liberty Br. 40-44. Aime's discussion of this point—though longer on words—is just as short on substance. In particular, Aime has no answer to Liberty's argument that it was unreasonable for him to rely on an extension he credibly doubted Liberty would honor. *See Gitter* v. *Cardiac & Thoracic Surgical Assocs., Ltd.*, 419 Fed. App. 365, 369 (4th Cir. 2011) ("[A] party's reliance upon the other's acts or assertions must be reasonable."); *Pierce* v. *Wells Fargo Bank*, 85 Va. Cir. 32, 37 (2012) ("Reliance cannot be reasonable if the person seeking estoppel knew or had an equal opportunity to know the true facts.").

Aime ignores Liberty's argument that he had good reason to doubt Liberty's intentions weeks before the original PSA expired. *See* Liberty Br. 41-43. In fact, elsewhere in his brief, he concedes this point, admitting that "he thought [the] deal was being unwound" by April 28, when he sent his second email to Hewitt. Aime Br. 24. Of course, because Aime never accepted nor offered any consideration for Hewitt's extension, Liberty was not bound by Hewitt's prior offer. But even assuming Liberty was bound, to claim estoppel, Aime must explain how it was reasonable for him to rely on an offer or agreement he no longer believed was available. *See Hughes* v. *Immediate Response Techs., LLC*, No. 14-cv-1699, 2015 WL 2157424, at *9 (E.D. Va. May 6, 2015) (finding it unreasonable as a matter of law for the plaintiff to rely on a representation he learned was inaccurate two weeks earlier), *aff'd per curiam*, 671 Fed. App. 109 (4th Cir. 2016). Aime's silence on this point is telling.

Instead, Aime spins his wheels responding to an argument Liberty did not even make: that it was reasonable for him to rely on an oral modification of a written agreement. Aime Br. 33-34. That response simply ignores Liberty's argument, as just discussed. In any event, Aime's irrelevant contention that Liberty "orally modified the PSA at least twice," *id.* at 34, simply reinforces that the district court misunderstood the parties' course of conduct.

Neither of the supposed oral modifications identified by the district court actually modified the PSA, and the district court's conclusions to the contrary were incorrect. First, the district court took issue with Liberty's decision, the day after Aime signed the PSA, to ban Aime from entering the franchise stores "even though this term does not appear anywhere in the PSA." Aime Br. 34; J.A. 872. By signing the PSA, however, Aime "relinquish[ed] all interests in the Business." J.A. 705. Liberty owned the franchises and had a right to dictate who could enter the premises. The district court did not identify any provision of the PSA that gave Aime a right to enter the stores he no longer owned, and no such provision exists.

Second, the district court's conclusion that Liberty orally modified the PSA when it attempted to sell the franchises to Jean-Louis also was incorrect. Soon after signing the PSA, Aime informed Hewitt that he would not be able to restore his EFINs by May 8. J.A. 425. Hewitt said he would allow one of Aime's associates—Fletcher at first, later Jean-Louis—to apply to purchase the franchises until the IRS restored Aime's EFINs. *Id.* In other words, because the parties understood that Aime's repurchase deadline was certain to lapse, they began to work toward a *separate* contractual arrangement with someone else. In so doing, Liberty did not "amend the PSA," J.A. 872-873; this new arrangement would not result in a contract between it and Aime.

Ultimately, the district court's erroneous conclusions about the parties' course of conduct are beside the point. Aime knew, or at least had strong suspicion, that Liberty no longer intended to extend his repurchase option. He "must be held to have acted at his own risk" in nevertheless relying on the prior offer. *Khoury* v. *Cmty. Mem'l Hosp., Inc.*, 123 S.E.2d 533, 538 (Va. 1962) (rejecting claim of equitable estoppel).

b. Aime also asserts that he "made considerable payments of rent and expenses without reimbursement after accepting Liberty Tax's extension." Aime Br. 33. Without the extension, Aime asserts he "would have proceeded to close out [his] accounts." *Id.* at 34. Again, he fails to explain why his reliance on Liberty's promise was reasonable. And, as explained above, even assuming he would have been able to cancel his multi-year leases and third-party utility contracts without advance notice, doing so would violate the PSA. *See* pp. 16-17, *supra*.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE THAT THE CONTRACT LACKED CONSIDERATION

At a minimum, the case should be remanded for a new trial because of the district court's erroneous exclusion of critical evidence about Liberty's sales and approval process—satisfaction of which was a condition to Aime's repurchase of his franchises. Aime does not dispute that the district court excluded the evidence as a *sanction* for Liberty's failure to produce documents, and he offers this Court no basis to conclude that the requested documents exist. The punitive exclusion of evidence for a party's failure to produce *non-existent* documents epitomizes an abuse of discretion. Nor does Aime respond to Liberty's argument that the exclusion was not harmless. *See* Liberty Br. 50-51. His defense of the district court's sanction—which largely rests on the argument that Liberty did not make a formal offer of proof—does not hold water. The judgment should be reversed.

A. An Offer Of Proof Was Not Necessary Under The Circumstances

Aime acknowledges that an offer of proof is not necessary when "the substance [is] apparent from the context." Aime Br. 35. Liberty's argument, the substance of the excluded evidence, and the connection between the two were apparent from the context here. In opening argument, Liberty's counsel explained that "in order for . . . Aime to exercise the option, . . . [he] had to meet several conditions." J.A. 159.[6] Specifically, Liberty explained that Aime "would have had to go through Liberty's sales and approval process" and "would have had to enter into new franchise agreements with Liberty." *Id.*

Then, Liberty offered the testimony of Angela Ianni, who, as a former regional director for Liberty, was "familiar with the process that is required for an individual or company to become a franchisee." J.A. 192. She explained that "[t]he approval process is coordinated by our sales team, but [franchise applicants are] approved by the regional director, the VP of operations, the CFO, and our CEO." J.A. 193. She then read the specific language of the

[6] Liberty began laying context for this argument in its pretrial dispositive motions, where Liberty argued that the opportunity to repurchase the franchises was "an opportunity to which Aime and Wolf were never entitled in the first place." Dkt. 57 at 10; *see also* Dkt. 51-1 at 4.

repurchase option, including the language conditioning Aime's ability to repurchase on Liberty's approval, and she explained that if Aime wished to exercise his option, "he would be treated as a new prospect" and "would have to sign new franchise agreements because he was no longer a franchisee." J.A. 221. The very next question ("Can you tell us what the sales and approval process entails?") was the one to which Aime objected. J.A. 221-222. The district court prohibited Ianni from answering the question, but by then "the nature of the proposed testimony was abundantly apparent from the very question put by [Liberty's] counsel." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 174 (1988). The PSA conditioned Aime's ability to repurchase on Liberty's standard sales and approval process, and Liberty's question was clearly designed to elicit testimony about it.

Liberty's argument about a lack of consideration turns, in part, on this right of approval, which is precisely why the district court's confusion about and exclusion of evidence concerning this right is reversible error. Throughout trial, Liberty vigorously opposed the district court's fixed view that Aime had a *right* to repurchase the franchises. *See* J.A. 661 ("[The Court:] He has every right to see how the business is doing when he has a right to repurchase."); J.A. 693-694 ("[Liberty] argued in closing argument before this court that they had no obligation to transfer all the stores back to them, which I find incredible."); J.A. 695 ("[T]he position that they were not obligated to sell all the stores back to him is absurd."). Ultimately, Liberty was unable to convince the court that its interpretation of the PSA as giving Aime a right to repurchase the franchises was incorrect. Ianni's excluded testimony would have provided evidence critical to this core issue in the case.

B. The District Court Improperly Sanctioned Liberty For Failing To Produce Documents That Do Not Exist

Liberty represented to the district court that "there are no sales and approval documents," J.A. 222, and Aime does not dispute that he declined to conduct a Rule 30(b)(6) deposition of Liberty to inquire about this undocumented internal process. Aime now argues that "the District Court was not obligated to accept any explanation by Liberty Tax's counsel about a lack of documents, *whether true or not*." Aime Br. 38 (emphasis added). That is obviously incorrect. *See, e.g.*, *Middle E. Broad. Networks, Inc.* v. *MBI Glob., LLC*, 689 Fed. App. 155, 160 (4th Cir. 2017) (concluding that party did not plainly violate Rule 26 when it "claim[s] no documents exist" regarding the relevant issue); *Waymark Corp.* v. *Porta Sys. Corp.*, 334 F.3d 1358, 1364 (Fed. Cir. 2003) ("Obviously sanctions cannot be based on the failure to produce a document that did not exist."). At the very least, given Liberty's representation that its witness would corroborate that no documents exist, subject to full cross-examination by Aime, *see* J.A. 222, the district court should have granted Liberty's request to substantiate its representation.

Aime makes only the feeblest of attempts to defend the district court's decision to sanction Liberty for failing to produce documents that do not exist.

First, Aime contends that Liberty was required to supplement its discovery response "to say that its search turned up empty," Aime Br. 37, but he cites no authority other than Rule 26(e), which does not include any such requirement. Rule 26(e) requires supplementation only when the party "learns . . . in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A).

Second, Aime invokes Liberty's response to his motion in limine, when it wrote that "[a]ny attempt to examine the extent to which Defendants could or would have been re-instituted as Liberty Franchisees if they had timely secured an EFIN *is nothing more than an exercise in speculation and futility*." Aime Br. 37. But that true statement in no way authorized the court to impose unwarranted sanctions. In any event, Aime confuses the relevant question on the merits. Whether Aime would have passed the approval process is, as Liberty said before trial, "an exercise in speculation and futility." That is because the sales and approval process grants Liberty's CEO discretion to approve or reject franchise applicants. The excluded testimony bore precisely on this issue.

Third, Aime claims, as justification for the district court's exclusion of Ianni's testimony, that she was not identified as a person with knowledge about the sales and approval process in interrogatory answers. That claim is baseless: Liberty identified Ianni as having knowledge "concerning the Purchase and Sale Agreement [PSA]," Dkt. 81-3 at 4, and the PSA expressly states that Aime's option to buy back the franchises is "subject to Purchaser's standard sales and approval process," J.A. 704. Tellingly, Aime did not argue below that Ianni's testimony should be excluded on the ground that her knowledge was not sufficiently specified in Liberty's interrogatory responses. Aime therefore waived any such argument, and this Court should not consider it.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

I. Aime's cross-appeal is baseless, as his half-hearted, four-page discussion of the cross-appeal confirms. The district court properly denied his fraud counterclaim as indistinguishable from his breach-of-contract claim. Aime cannot point to any evidence that credibly demonstrates that Liberty fraudulently induced him to sign the PSA, let alone the clear and convincing evidence that would be required to prove fraud.

II. Nor does Aime offer any compelling reason why this Court should reverse the district court's discretionary refusal to award attorneys' fees, even if Aime had proven fraud. The district court denied fees for two reasons: first, under Virginia law, fees for fraud are only available for actions in equity, whereas this is an action at law; and second, Aime's large recovery is more than adequate to cover his fees, unlike the "limited circumstance[s]" in which Virginia courts have deviated from the American rule. J.A. 885. Aime disputes the district court's first reason, but without engaging with the vast body of Virginia law that runs directly counter to his argument. Worse still, Aime offers no basis for concluding that the district court's second reason was an abuse of discretion.

ARGUMENT ON CROSS-APPEAL

I. THE DISTRICT COURT CORRECTLY DENIED AIME'S COUNTERCLAIM FOR FRAUD

The district court denied Aime's "fraudulent inducement" claim on the basis that "the allegations that comprise this cause of action are not sufficiently distinct from those underlying Counts One and Two and are thus barred by the independent tort doctrine." J.A. 885. The independent tort doctrine is designed to prevent plaintiffs from turning every breach-of-contract claim into a tort claim with the opportunity to collect tort damages, particularly punitive damages. *See A&E Supply Co.* v. *Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 672 (4th Cir. 1986). Virginia law thus prohibits plaintiffs from pursuing a tort claim based on a breach of contract, except in the limited situation where "the breach establishes the elements of 'an independent, wilful tort.'" *Id.* (quoting *Kamlar Corp.* v. *Haley,* 299 S.E.2d 514, 517 (Va. 1983)).

As the district court recognized, Aime's fraud claim was merely a repackaged version of his claim for breach of contract. By concluding that

Aime's fraud claim was "not sufficiently distinct" from his breach-of-contract claims, J.A. 885, the district court necessarily concluded that Aime had failed to prove the independent tort of fraud. "The charge of fraud is one easily made, and the burden is upon the party alleging it to establish its existence, not by doubtful and inconclusive evidence, but clearly and conclusively. Fraud cannot be presumed." *Aviles* v. *Aviles*, 416 S.E.2d 716, 719 (Va. Ct. App. 1992) (internal quotation marks omitted). "The elements of actual fraud are: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Winn* v. *Aleda Constr. Co.*, 315 S.E.2d 193, 195 (Va. 1984). The elements of fraud must be proven by clear and convincing evidence. *Id.*; *Evaluation Research Corp.* v. *Alequin*, 439 S.E.2d 387, 390 (Va. 1994).

Aime does not even address the elements of a fraud claim in his brief. At most, his brief argues that Liberty induced Aime to enter the PSA by promising to pay expenses. *See* Aime Br. 40-41. He asserts that "Liberty Tax failed to make expense payments from the outset." Aime Br. 41; *see also id.* at 40-41 (stating that Liberty promised to assume expenses "[a]s an inducement for this offer" (emphasis omitted)). But that contractual promise to pay expenses—again, the only alleged inducement he identifies in his brief—could support a fraud claim only if Liberty's "intent [was] never to abide by the terms of the contract." *Richmond Metro. Auth.* v. *McDevitt St. Bovis, Inc.*, 507 S.E.2d 344, 348 (Va. 1998) (warning "against turning every breach of contract into an actionable claim for fraud").

Aime identifies no evidence of such an intent, nor could he: Liberty made the vast majority of payments from the outset of the PSA. The district court found that Liberty stopped making "certain utility payments for many of the franchises on March 29, 2016," J.A. 867—more than two months *after* signing the PSA. Moreover, Aime identified only four rent payments (across nine different franchises) for which Liberty did not reimburse him between January 21 and May 8, 2016. *See* J.A. 746-755. Thus, to the extent Liberty failed to make expense payments, the problem was limited, as Aime testified, to "a *couple* of leases, utilities, [and] phone bills." J.A. 472 (emphasis added). Given that Liberty paid the vast majority of expenses as required under the PSA, Liberty's alleged failure to pay the few remaining expenses does not create an inference that it "entered the PSA never intending to abide by it." Aime Br. 40. Rather, as the district court held in its post-trial ruling, those omissions supported Aime's claim for breach of contract, but not the independent tort of fraud.

Aime also quotes the district court's oral statements that Liberty "never had any intention of recognizing Mr. Aime's right to repurchase the business" and that it "simply looked upon the [PSA] as a piece of paper that they could do with as they please." Aime Br. 40. He makes no effort, however, to tie those statements to the elements of fraud; he does not identify any misrepresentation by Liberty intended to mislead, nor does he identify any reliance on such a misrepresentation or resulting damages. Moreover, the only breach of the original PSA found by the district court was Liberty's failure to pay certain expenses. As already discussed, Aime did not prove that Liberty never intended to make those payments. It is no doubt for that reason that the district court *concluded that Aime failed to demonstrate fraud*, notwithstanding its musings about Liberty's intent.

In any event, the district court's observations about Liberty's intent (as modified to fit its final Opinion and Order), were propped up by two conclusions, both erroneous. First, misreading the PSA, the court erroneously concluded that Aime had a right to repurchase the business. J.A. 869. In fact, as Liberty argued above, Aime had only an opportunity to repurchase that was subject to Liberty's standard sales and approval process. *See* pp. 18-20, *supra*. On its face, the PSA states that Aime's option to buy back the franchises is subject to conditions precedent, including the execution of a separate purchase and sales agreement that is "subject to" Liberty's standard sales and approval process. J.A. 704.

Second, the court erroneously concluded that Liberty acted improperly by accepting and processing Jean-Louis's franchise application. J.A. 869. The record plainly dispels that conclusion. The evidence showed that Liberty did this at Aime's insistence, and only after he informed Hewitt, five days *after* signing the PSA, that he would not receive his EFINs before the May 8 option deadline. J.A. 301, 425-426. Aime's current cries of fraud contrast starkly with how he felt about Liberty when it agreed to this alternative arrangement *at his urging*. In an email to Hewitt on February 11, he wrote: "I am excited to say I have great news my partner Sergio jean-louis has received his efins and is accepted finally. I am ready to move forward with your blessings. Thank you for saving me and the business as a whole." J.A. 140.

There is no basis for this Court to overturn the determination of the trial court and make its own contrary finding that Aime satisfied his demanding evidentiary burden to prove fraud. Applying Virginia's independent tort doctrine, the Virginia Supreme Court has affirmed the dismissal of claims strikingly similar to those made by Aime here. *See, e.g.*, *Richmond Metro.*, 507 S.E.2d at 347. In *Richmond*, the court dismissed the plaintiff's fraud claim because each alleged misrepresentation by the defendant "related to a duty or an obligation that was specifically required by . . . [c]ontract." *Id.* Moreover, after examining the record, the court concluded there was no evidence that the defendant "did not intend to fulfill its contractual duties at the time it entered into" the contract. *Id.* at 348; *see also Agri-Tech, Inc.* v. *Brewster Heights*

Packing, Inc., 7 F.3d 222 (4th Cir. 1993) (per curiam) (unpublished table decision), 1993 WL 398486, at *5 ("Nothing in the record supports a finding that Agri-Tech had no intention to [abide by the contract]" and thus "the allegations may be actionable in contract . . . but they do not give rise to the independent tort of fraud."); *Dator Corp.* v. *Rufus S. Lusk & Son,* Nos. 94-1365, -1401, 1995 U.S. App. LEXIS 14605, at *4 (4th Cir. June 14, 1995) ("[A]ny tort claim appended to a contract action must be *wholly* independent of the breach of contract claim." (emphasis added)). This Court should affirm the dismissal of Aime's fraud claim.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT AIME WOULD NOT BE ENTITLED TO ATTORNEYS' FEES EVEN IF HE PROVED FRAUD

The district court denied Aime's request for attorneys' fees on two alternative grounds. First, it observed that Virginia law limits a court's authority to award attorneys' fees for fraudulent inducement to actions in equity; because Aime's claims are at law, the court concluded that Aime was not entitled to attorneys' fees as a matter of law. J.A. 885. Second, the court observed that "this litigation does not appear to qualify as a limited circumstance where the Court should exercise its discretion to grant Defendants an award of attorneys' fees." *Id.* Although Aime focuses his arguments exclusively on the first rationale, the district court's second rationale is plainly an exercise of discretion. Aime does not even attempt to argue that the court abused its discretion.

Any such argument is waived, and the Court should deny Aime's request for attorneys' fees on that basis alone.

A. The district court's conclusion that Virginia courts reserve an award of attorneys' fees in fraudulent inducement cases for actions in equity is correct. Generally speaking, Virginia courts "strongly adhere[]" to the American Rule in all but a few, limited circumstances. *Oswald* v. *Holtzman*, 90 Va. Cir. 9, 10 (2015). One such exception is when a court of equity finds a defendant liable for fraud; in such cases, the court of equity (or a court exercising jurisdiction over an action in equity) may, in its discretion, award attorneys' fees to the prevailing party. *See Prospect Dev. Co.* v. *Bershader*, 515 S.E.2d 291, 301 (Va. 1999).

Bershader, the principal case on which the district court relied and the foundational Virginia case on this issue, involved an appeal from the chancery court. *Id.* at 293-294. In recognizing the recoverability of fees for fraud, the Supreme Court's opinion limited the discretion to make such an award to chancellors: "We hold that in a fraud suit, a chancellor, in the exercise of his discretion, may award attorney's fees to a defrauded party." *Id.* at 301. The Court then quoted the chancellor's justification for the award, which directly tied the award to his equitable powers: "I'm simply unable to see the equity involved in [holding that the defendants] actually defrauded [the Bershaders but they are] going to have to spend . . . over $171,000 in attorneys' fees." *Id.*

(alterations in original) (internal quotation marks omitted). Moreover, the intermediate circuit court, upholding the chancellor's award, stated: "[T]his court has held that attorney's fees are permitted in a fraud case under the Court's equitable powers. . . . [A]s this case invokes the equitable powers of the Court, the Bershaders are entitled to seek reasonable attorneys fees . . . ." *Bershader* v. *Prospect Dev. Co.*, 47 Va. Cir. 20, 34 (1998) (citing *Anderson* v. *Sharma*, 38 Va. Cir. 22 (1995)).

Every subsequent Virginia Supreme Court decision applying *Bershader* has involved claims for relief of an equitable nature. *See, e.g.*, *Devine* v. *Buki*, 767 S.E.2d 459, 464 (Va. 2015) (repeatedly referencing the "equitable jurisdiction" of the lower court proceedings); *Carlson* v. *Wells*, 705 S.E.2d 101 (Va. 2011) (involving a claim for accounting, historically an equitable remedy); *Tauber* v. *Commw. ex rel. Kilgore*, 562 S.E.2d 118 (Va. 2002) (affirming chancellor's denial of fees). Aime does not identify any Virginia Supreme Court case applying *Bershader* in the context of a legal, as opposed to equitable, claim.

Since *Bershader*, several courts have specifically concluded that the Supreme Court's decision is limited to cases arising in equity. *See, e.g.*, *Oswald*, 90 Va. Cir. at 12; *Adair* v. *EQT Prod. Co.*, No. 10-cv-37, 2011 WL 4527433, at *27 (W.D. Va. Jan. 21, 2011) ("[T]he *Bershader* exception for allowing attorneys' fees in fraud suits exists only in suits in equity, not at law."), *adopted by*

2011 WL 4527647 (W.D. Va. Sept. 28, 2011); *Anand, L.L.C.* v. *Allison*, 55 Va. Cir. 261, 269 (2001) (finding it doubtful that "the trial judge in a law action in which fraud has been proven, has the same power to award attorney's fees as does the chancellor"). For example, in *Oswald*, the court denied the plaintiffs' claim for attorneys' fees because "at no point in this litigation have they claimed to be seeking equitable relief." 90 Va. Cir. at 12. Quoting the *Bershader* decisions at length, the court concluded that both courts "made clear that the award of attorneys' fees was directly linked to the equitable nature of the relief granted." *Id.* at 11. The court rejected the plaintiffs' reliance on two cases at law in which fees were awarded for fraud. Those two decisions provided no analysis beyond a bare citation to *Bershader*, and the *Oswald* court thus found them unpersuasive. *Id.* at 12 n.3.

Here, Aime's dismissed fraud claim is legal, not equitable, as it seeks money damages to compensate him for losses, which the court awarded on the breach-of-contract claim. Attorneys' fees thus would not be available to Aime under Virginia law even if he prevailed on his fraud claim.

B. Even if attorneys' fees were available when fraud is proved in cases at law, this Court should uphold the district court's decision, in its discretion, to deny Aime's request. The purpose underlying the award of attorney's fees in *Bershader* was "the avoidance of a hollow victory." *CF Tr.* v. *First*

Flight L.P., 359 F. Supp. 2d 497, 502 (E.D. Va. 2005). The *Bershader* chancellor awarded fees because he was "unable to see the equity involved in" forcing the Bershaders to spend $171,000 collecting on a fraud claim worth $205,378. 515 S.E.2d at 301 (internal quotation marks omitted). By contrast, as the district court observed, Aime has spent $211,635 on a claim worth $2,736,896.17—hardly a hollow victory. *See CF Tr.*, 359 F. Supp. 2d at 503 (rejecting a request for $179,000 in fees where the party won a multimillion-dollar judgment). The district court did not abuse its considerable discretion in concluding that it would not have granted Aime attorneys' fees even if he had proved fraud.

CONCLUSION

The district court's judgment for Aime on his claims for breach of contract and breach of the implied covenant of good faith and fair dealing should be vacated and the case remanded for further proceedings. The district court's dismissal of Aime's fraud claim and denial of his request for attorneys' fees should be affirmed.

Respectfully submitted.

/s/ Allison J. Rushing

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Allison J. Rushing, counsel for appellants and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Brief of Plaintiffs-Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 10,807 words.

/s/Allison J. Rushing
ALLISON J. RUSHING

NOVEMBER 21, 2017

CERTIFICATE OF SERVICE

I, Allison J. Rushing, counsel for appellants and a member of the Bar of this Court, certify that, on November 21, 2017, a copy of the attached Reply Brief and Cross-Appeal Response of Plaintiffs-Appellants was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/Allison J. Rushing
ALLISON J. RUSHING

NOVEMBER 21, 2017